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No. 218

IN THE

SUPREME COURT OF THE UNITED STATES.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,

Appellant,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, RICHARD ABRAM, Chairman and State Legislative Representative, and ILLINOIS COMMERCE COMMISSION,

Appellees.

Appeal from the Supreme Court of the State of Illinois to the Supreme Court of the United States.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS.

BRUCE A. CAMPBELL,
RUDOLPH J. KRAMER,
CARLETON S. HADLEY,
WALTER N. DAVIS,
LOUIS A. McKEOWN,
Counsel for Appellant, Terminal Railroad Association of St. Louis.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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INTRODUCTION.

Appellees have filed with the Clerk of the Supreme Court of the State of Illinois, in accordance with the provisions of Rule 12 of this Court, their statement in opposition to the jurisdiction of this Court of this cause on direct appeal, and have included in said statement, as permitted by the rules, a motion that this Court either dismiss this appeal for want of a substantial federal question, or, in the alternative, that the judgment of the Supreme Court of

the State of Illinois be affirmed by this Court at this stage of the proceedings. This statement and motion was served on appellant on June 24, 1942.

Appellees concede that this Court has jurisdiction in this case on direct appeal from the Supreme Court of the State of Illinois. The only grounds assigned in opposition to jurisdiction and in support of their motion to dismiss or affirm, are that the alleged unsubstantial character of the grounds upon which appellant relies are so apparent as to warrant this Court in summarily disposing of the appeal at this stage of the proceeding upon a motion to dismiss or affirm, as provided by Rules 7 and 12 of this Court as amended.

Appellees' statement really constitutes a lengthy and complete brief on the merits of the case.

In filing our statement as to the jurisdiction of this Court on appeal we attempted fully to comply with both the letter and the spirit of paragraph 1 of Rule 12 of this Court as amended on April 6, 1942. We did not conceive that it was either necessary or proper in that statement to recite fully the evidence contained in the record or extensively to argue the legal points involved; but stated therein that upon an argument of the merits it was proposed to file a further and more extended statement as may be necessary for the consideration by this Court of this case on its merits, and also further decisions in support of our position. We conceived that the letter and spirit of Rule 12 only required us to quote such testimony and cite such cases as would clearly show that this Court had jurisdiction of this cause on direct appeal and that the federal questions presented were substantial. In that statement, in compliance with Rule 12, we showed the nature of the case, the rulings of the Court, bringing the case within the jurisdictional provisions relied upon, cited cases believed by us to sustain jurisdiction and also in-

cluded a statement of the grounds upon which we contend that the federal constitutional questions involved are substantial, together with citation of authorities in support thereof. In addition, as we read amended Rule 12, we covered all of the requirements of that rule when the appeal is from a state court. We even went further by citing authorities in support of our contentions as set forth in our petition for appeal, in our assignments of error and in our statement as to jurisdiction.

Appellees now seek on this motion to argue the case on its merits, both as to the law and the facts, with an extended statement of their version of the facts contained in the record, and the citation of many authorities said to support their position, together with copious quotations from many of these authorities.

As we have stated, appellees not only concede that under the statute this Court has jurisdiction of this case on direct appeal, but, in addition thereto, they also concede that we have correctly stated the various procedural steps taken before the Illinois Commerce Commission and in the various Illinois courts; that our statements are correct representing the technical jurisdiction of this Court; that the various Illinois statutes involved have been correctly quoted, and the correct dates of the various orders and the taking of this appeal stated, and that we have fully shown the timely and adequate presentation of the various federal questions involved in the Illinois courts and their rulings thereon.

However, out of an abundance of caution, we shall as briefly as possible reply to the statement filed by appellees in support of their motion to dismiss. We ask that this reply be considered in connection with our original statement as to jurisdiction which was filed with our petition for appeal, and upon which the Chief Justice of the Illinois Supreme Court allowed this appeal on June 11, 1942.

APPELLANT'S STATEMENT IS CORRECT.

Under the heading "Corrections in Appellant's Statement" appellees attack our statement of facts as contained in our statement as to jurisdiction. We shall consider these alleged inaccuracies in our statement.

Appellees attack our statement as incorrect in stating that it is impossible to cut off or couple a caboose on the bridges in the middle of the river; in stating that as a practical proposition the necessary effect of the Commission's order is to require appellant to carry its cabooses across the river into Missouri on westbound cuts and to put cabooses on its trains in Missouri on eastbound cuts in order to comply with the Commission's order; and in stating that the Supreme Court of Illinois had found the facts to be substantially as stated by us. It is stated by appellees that this statement is incorrect, insufficient, inadequate and rather misleading.

We respectfully refer to the record in support of our original statement. It will be remembered, as we have shown in our statement, that there are only two main tracks on each of the bridges; that it is impossible to cut a caboose in the middle of the river on the bridges and leave it standing on either of the bridges; that there is no place to do this because it would tie up the main tracks (Tr. 2—106). It is impossible to double to a caboose in crossing the river for the reasons explained by witness Davis (Tr. 2—108). At the Eads Bridge a tunnel begins about 500 feet from the west end of the bridge and only the two main tracks run in the tunnel, the same as they do on the bridge. The vast number of train movements on these bridges are described in our statement. These aggregate about 176 trains on each bridge each day (Tr. 2—106) or an average of a train every eight minutes on each bridge. As appellant's witness Davis said (Tr. 2—106-107), "It would not be possible to cut a caboose in

the middle of the river. We have no place to do it. Two trains would tie up the main tracks. The only practical way of doing that would be to start in Missouri on a movement to Illinois at our yard and bring the caboose the whole way, or from Illinois to Missouri to take it to Missouri. The same situation would apply to the Merchants Bridge."

Furthermore, R. B. Thomas, Chief Railroad Inspector for the Commission, who testified as a so-called Commission witness, corroborated the testimony of appellant's witnesses upon these points. Thomas stated (Tr. 2, 138), "All these runs over these two bridges either come from the State of Missouri to Illinois or go from the State of Illinois to the State of Missouri." Thomas further stated (Tr. 2, 139), "As a practical proposition, to put cabooses on those runs across the river would require them to be hauled on over to St. Louis on runs from Illinois and put on the train on the runs in Missouri to bring them into Illinois, from the observation I made on the bridge, as I did not see any places cabooses could be set out in Illinois. If a caboose was taken to the middle of the river on either of these bridges, either westbound or eastbound, as a practical railroading proposition it would be necessary to take them on to the other side of the river."

Furthermore, the Illinois Supreme Court in its opinion (Tr. 9) said: "Though the Commission's order applies only to cuts of cars moving within the State, it is argued by appellee, and not disputed, that the only practical way in which the order can be carried out on runs across the river is to carry these cabooses across the bridge into appellee's yard on the opposite side of the river."

Furthermore, the Supreme Court of Illinois in its opinion (Tr. 14) said: "As to finding No. 35, which involves cuts of cars taken across the river into Missouri, counsel for appellee earnestly argue that, since there are no means of leaving a caboose at the State line, where it could be

picked up on return, the only practical way in which compliance with the order of the Commission may be had is to carry such caboose with the cut of cars into its yards in Missouri and attach it in Missouri, and bring it back over the bridges so as to comply with the order within the State. This, appellee contends, is, in practical effect, a regulation of the movements of the appellee's trains in the State of Missouri, which is beyond the power of this State or its Commission."

Furthermore (Tr. 17), the Supreme Court of Illinois in its opinion, in referring to our contentions, said: "They point out that if cabooses are required on these interstate switching runs, appellee will necessarily have to transport them for some distance in Missouri, and Missouri could enact conflicting regulations."

Furthermore, in its opinion (Tr. 17), the Supreme Court of Illinois said: "Does the fact, if such be a fact, that the only practical method of complying with the order would be to haul these cabooses into Missouri of itself render the order of the Commission invalid as a direct burden upon interstate commerce?"

The Supreme Court of Illinois then (Tr. 17-18) rejected our contentions based upon these facts upon the ground that the effect of the order was not a direct burden on interstate commerce, but merely an inconvenience occasioned by the exercise of its police power by the state, and upon the ground that the order on its face was not directed against interstate commerce, but on its face must be taken as not so directed, and that because the order purported on its face only to apply to train movements within the state, the fact that it does affect interstate shipments or cuts of cars between the two states occasioned only an indirect effect upon interstate commerce.

In their statement, appellees seek to point out that the evidence shows crossovers on the two bridges, and cite the record (Tr. 2, 141 and Tr. 2, 28) in support of this

contention. A reference to the testimony of Thomas (cited Tr. 2, 141) shows that all he testified was "There are no crossovers that I observed from one track to another on the Merchants Bridge in Illinois. There are perhaps two crossovers on the approach to Eads Bridge in Illinois." The testimony of witness Jenkins (Tr. 2, 28-29) is referred to. His testimony shows that there is a crossover on the Merchants Bridge about 700 feet from the water line in Illinois so that trains could be transferred from one track to another when necessary, and that there is a crossover on the Eads Bridge, but he was not certain as to whether it would be in the State of Illinois or not, although he thought it would be; and he testified that it would be possible to put crossovers on these bridges in the State of Illinois.

Assuming all of these facts to be true, the undisputed evidence shows that with the hundreds of trains running each day over these bridges, and with only two main tracks, it would be impossible to cut a caboose from one main track to another main track and leave it on the other main track, even though crossovers existed. Such practice in itself would directly hinder, obstruct and impede interstate traffic.

We submit, therefore, that our original statement was correct and that the only practical way to comply with the order was as we have above stated, which necessarily required compliance with the order between the state line and a yard in the State of Missouri, where the Commission had no power, jurisdiction or authority to act.

Counsel for appellees also contest our statement that the furnishing of cabooses has always been considered a working condition and has been dealt with as such by appellant and its switchmen, and that caboose cars have always been and are being furnished on certain runs by reason of written contracts between the Brotherhoods and appel-

lant. It is said that this is an inaccurate statement and that the record in no wise sustains our statement that the furnishing of cabooses has been, and is, considered a working condition.

As to what runs cabooses were furnished by agreement with the Brotherhoods and as to the contract between the parties, the record is clear (Tr. 2—111-112-115). The record shows (Tr. 2—113) as to how the use of cabooses has been regulated from 1910, when three cabooses were furnished by agreement, until the time of the trial, when thirty-one cabooses were in use. In each instance these agreements were made with the men through their representatives, and the current agreement as to cabooses is shown in full (Tr. 2—114-115) as a result of an agreement between appellant and the officers of the Brotherhood.

Furthermore, it is said that the evidence as to delays by furnishing cabooses is largely hearsay, and a quotation is cited from the testimony of one of appellant's witnesses (Tr. 2—198) to the effect that his knowledge of delays in the Pennsylvania yards was based on hearsay. This witness was the superintendent of appellant, having full knowledge of its switching operations, and while it is true that as to the delays in the Pennsylvania yards his knowledge was gained by hearsay, his testimony as to delays on all other runs was from actual knowledge and observation.

Furthermore, appellant produced its three general yardmasters in Illinois, L. E. Knight (Tr. 2—188), R. D. Parish (Tr. 2—183) and Walter H. Rolen (Tr. 2—172), all of whom corroborated the superintendent's testimony as to the average delay occasioned by the furnishing of cabooses. In addition, F. M. Heinlein, yardmaster for the Pennsylvania Railroad, testified (Tr. 2—163) as to the delays in the Pennsylvania yards, and as to appellant's runs to and from this particular Pennsylvania yard. He

testified (Tr. 2—167) that there would be an average delay of between fifty minutes and one hour on a forty-car train from the appellant, taking a cut back to the appellant, with a caboose, over what there would be without one, and that the maximum or top figure of delay would exceed one hour, not including any delay in appellant's CD yards.

It is further said that Davis' testimony of an average of forty minutes delay and $10.00 cost per run was likewise without factual basis in the record, and that his estimate of the $400,000.00 outlay for the first year was of the same incompetent character. This is not true. The witness (Tr. 2—114) testified that the initial cost would be $150,000.00 to purchase the necessary cabooses, and that the annual cost by reason of delays in switching occasioned by the use of cabooses would be $250,000.00, and that he based this statement on the number of runs involved at an average of $10.00 per run, or at an aggregate value of $100.00 for each eight hours an engine and crew were used.

Thomas, the Commission's witness, testified that he would not be surprised to learn that at the present time, with increased wages, etc., the value of a switch engine was figured at $100.00 for a day of eight hours (Tr. 4—19); and he testified that in the '20s, when he worked for the Illinois Central, the charge was $75.00 for an eight-hour day (Tr. 4—19 and Tr. 2—124). However, this is more or less immaterial now, because the Supreme Court of Illinois found that the evidence showed that the delay occasioned was from eleven minutes to forty minutes per movement, and that appellees conceded that some time is required to add a caboose to these cuts of cars.

Appellant's Exhibit 36 (Tr. 4, 36-37) shows a large number of these movements on a typical day, and fully substantiates appellant's contention as to the cost.

Furthermore, it is said that our statement that the Commission's testimony showed that the initial cost of new cabooses would be $44,000.00 and the extra annual expense in wages about $62,000.00 is inaccurate, although it is admitted that the initial cost of shelter cabs was estimated. However, the testimony clearly shows that Thomas was estimating the cost of shelter cabs, while the order requires caboose cars, and that he did not consider a sufficient number of cabooses to handle the business of appellant. The evidence shows that fifty additional cabooses would be needed (Tr. 2-157), in addition to the thirty-one cabooses now in use (Tr. 2-113).

As to the annual cost, it is true that Thomas, in explaining his report (Tr. 2-140), referred to a figure of $27,777.22 as the extra wages involved by reason of handling cabooses. This was based on actual time as shown by his "show" tests, but his report shows, when the various items are added up, that the maximum delays would result in an outlay of about $62,000.00 per year in wages alone (Tr. 2, 210-231, 250-266). This covered only wages (Tr. 2, 250-266), and it will be noted (Tr. 2, 250) that Thomas stated in his report as follows: "It is estimated that the total annual railway operating expenses for cabooses will be approximately two and a quarter times the estimated annual crew wages for handling cabooses." It is submitted that when the $27,777.22 figure, covering only wages, is multiplied by two and a quarter, as testified by witness Thomas, the annual extra cost is $62,000.00. This is based upon his actual tests, and if his maximum delay is considered, the total cost would approximate our testimony of an outlay of $150,000.00 annually.

It is said that we misquoted the opinion of the Supreme Court of Illinois to the effect that the evidence before the Commission showed that the delays per run ranged from 11 minutes to 40 minutes per movement. An examination of that part of the opinion quoted in the statement shows

that that is exactly what the Supreme Court of Illinois did say.

It is immaterial here whether the delay on each run was eleven minutes, forty minutes or some intermediate figure. It is likewise immaterial whether the original cost of new cabooses was $44,000.00 or $250,000.00, or some intermediate figure. It is likewise immaterial whether the added annual expense would be $62,000.00 or $250,000.00. In any event, the delays and costs would be sufficient to support our contentions that substantial federal questions are presented for determination by the Court.

Furthermore, the tests made by Thomas were made under ideal conditions. Everything was set for the tests, advance information having been given to everyone concerned in the yard force (Tr. 2, 156). It was a "show run" and was given preference over everything, where regularly they would have to take the cars, get the caboose when they could and get out when they could (Tr. 2, 156). The evidence further showed that in actual practice the delays with a caboose would be many times greater than shown by the test runs (Tr. 2, 156-157). Fifty new cabooses would be necessary to comply with the order (Tr. 2, 157). Thomas' figures referred only to shelter cars and not to caboose cars, which are required by the order. The testimony of the witness Davis as to the delays is found in the transcript (Tr. 2, 114, 155-161).

In regard to the statement as to the use made of a caboose when attached to these switching runs, attention is called to the undisputed testimony of witness Davis (Tr. 4, 23) to the effect that the cabooses would only be available for use of the rear switchman, who would only ride it when it was moving between one yard and another, and the testimony to the same effect (Tr. 2, 155). The statement that this one rear switchman would only use a caboose for one-sixth to one-eighth of his working time is based upon the exhibits (Tr. 4, 27-28-29-30-31-32) show-

ing the time between yards and the number of movements, which conclusively show that in a rear switchman's eight-hour period he would only use the caboose the time stated.

Answer to Appellees' Addition to Statement.

Appellees also have in their statement and motion a division under the heading of "Additions to Appellant's Statement." We do not think on this motion to dismiss that we are required fully to answer this, because the material facts necessary for the determination of the federal questions involved are set forth in our statement as to jurisdiction of this Court on appeal and in what we have heretofore said in this brief. These matters may, and probably will, become material on the consideration of the merits of this appeal, but not on this preliminary question as to the jurisdiction of this Court on appeal, and as to whether or not substantial federal constitutional questions are involved.

Since our original statement was filed, showing the opinion of the Supreme Court as reported in 379 Ill. 403, the opinion has been printed in the Northeastern Reporter, its citation being 41 N. E. (2d) 481.

However, some of the alleged facts contained in the additional statement require either amplification, modification or explanation. Of course, the dangers incident to lack of cabooses are greatly exaggerated in appellees' statement. The undisputed testimony shows that an engine crew consists of five men. The engineer, fireman, foreman and head brakeman all ride on the engine and only the rear brakeman would have any use of the caboose (Tr. 4, 23; Tr. 2, 155), and he would only be able to use it a very small part of the time—probably from one-eighth to one-sixth of the time he worked, because he would not use it when making switches in the yard, making up

trains, breaking up trains, when flagging street crossings and when going through interlockers and when doing switching. The rear switchman could only use a caboose between yards. For example (Tr. 2, 196), on the run to the Pennsylvania, the rear switchman would spend only eleven minutes in the caboose and the rest of the time he would not be able to use the caboose. The running time between yards (Tr. 2, 27) is from fifteen to thirty minutes, with one exception, and on that run cabooses are furnished.

The distance between yards varies as to the 20 so-called Illinois runs from 6,800 feet to 41,000 feet; four of these are less than 10,000 feet apart; 10 are from 10,000 to 20,000 feet apart, and six are over 20,000 feet apart. On some of these longer runs cabooses are furnished the entire year, and on some of them from October 15 to May 15 (Tr. 4, 30). A rear switchman (Tr. 4, 19; Tr. 2, 162) only uses a lantern by night and a flag by day; he has no other equipment and consequently needs no place to store it. The men quit at the same place where they report (Tr. 2, 154). There are sixteen service stations in the three yards in Illinois at various places, giving ample facilities for storage of street clothes, lunches, etc. (Tr. 4, 38-39), and there is also a seatbox in the engine for that purpose (Tr. 2, 155).

Appellant has been losing money for years, the net loss for the seven years before the hearing being over $1,300,000, or an average yearly loss for the seven years of nearly $200,000 (Tr. 4, 33-34). For the first six months of 1938, while the hearing was in progress (Tr. 4, 33), a loss of over $1,000,000 was sustained, and in July, 1938, when the case was being tried, appellant suffered a loss of over $112,000. The same figures were shown by the income tax reports (Tr. 4, 33).

In one typical day of 24 hours, there were 29 movements from Cabin No. 1 in CD Yard; 25 movements to and from the St. Louis district; 50 movements through Bridge

Junction; six movements over the Merchants Bridge; 39 movements in and out of Madison Yard; 21 movements of west side crews into and out of Madison Yard; 71 movements into and out of Wiggins Yards 2 and 5; eight movements from CD Yard to the Pennsylvania; nine to the Alton; 11 to the Wabash, and 10 to the Big Four (Tr. 4, 36-37).

From 1928 to 1936 (Tr. 4, 32) there were eight injuries to employes in cabooses, one on the rear end and seven while riding on cars, showing that in nine years, out of 16 accidents, eight happened to men riding in cabooses, seven while riding on cars and only one while riding on the rear end.

Very few of the lines around St. Louis use cabooses in deliveries to appellant (Tr. 2, 96). On one of the runs shown by Thomas' testimony, where the test showed a delay of two minutes for the caboose, if there had not been advance notice given and everybody lined up to do a specific move, if it was a regular and ordinary move, it would take from 30 to 40 minutes to get the caboose and put it on the train, get the caboose on the return trip from the I. C., bring it back to the CD Yard and put it away (Tr. 2, 155). To the same effect is the testimony Transcrip; 2, 191. The delays would average 40 minutes on every delivery made with a caboose out of all of the yards involved (Tr. 2, 161).

These figures are for a period three or four years ago. With the increased business and necessity of expeditious movement caused by war conditions, the delays and consequent expense to appellant to comply with this order would be vastly more than shown by the record.

The fact that some other railroads in the territory furnish cabooses has no bearing on the questions involved on this appeal.

As to the runs involved in finding 35 (the bridge runs), the questions of delay, expense and extraterritorial effect

are involved; while as to the runs involved in finding 34 (the interyard runs), the questions of delays and expense only are involved.

The Federal Constitutional Questions Involved on This Appeal Are Substantial in Character.

We think that we have covered this point in our statement as to jurisdiction sufficiently for the purposes of considering appellees' motion. However, out of an abundance of caution, we deem it advisable and necessary briefly to answer appellees' argument on this point. We do, however, ask to have our statement as to jurisdiction and the points and authorities contained therein also considered in connection with this part of our brief.

We conceive the law to be as stated in our statement as to jurisdiction, that if Congress has not legislated in the field the state may pass and enforce proper police regulations which only indirectly and incidentally affect interstate commerce. However, if Congress has taken possession of the field, even though not of the particular subject involved, then the state cannot regulate, whether the effect on interstate commerce be direct or indirect. We conceive it further to be the law, as shown in our statement as to jurisdiction, that the state cannot legislate, even though it purports only to legislate within its own limits, where as a practical proposition its order must necessarily be enforced and carried out in another state where the state legislating has no power, jurisdiction or authority. The state legislation is invalid when its necessary practical effect is extraterritorial. In other words, we contend, and have cited numerous authorities in our statement to that effect, that if Congress has taken possession of the field the state cannot legislate at all, whether its effect on interstate commerce is direct or indirect; but that if Congress has not taken possession of the field, then the state may

legislate by the enactment of proper police regulation, provided the enforcement thereof does not directly affect and burden interstate commerce. We also make contentions connected with the violation of the Fourteenth Amendment in depriving appellant of its property without due process of law, which we shall take up later in this brief.

Appellees in their statement concede the law to be as above set forth. They concede that if Congress has not taken possession of the field and the effect on interstate commerce is only indirect or incidental, then the state may pass and enforce proper police regulations, but that it cannot do so if the enforcement of these regulations directly affects or burdens interstate commerce. Appellees contend that the United States has not legislated in the field, that the effect on interstate commerce is only indirect or incidental and not direct; that the order does not require extraterritorial enforcement and that it does not deprive appellant of its property without due process of law.

The Order Does Directly Burden and Affect Interstate Commerce and Does Have an Extraterritorial Effect.

We showed, by citation of authorities in our original statement, that even if the state legislation on its face purports to be limited to the confines of the state, and does not on its face purport to regulate interstate commerce, yet in determining its constitutionality it must be considered from the standpoint of what it actually results in rather than from the standpoint of what it purports to do. The Supreme Court of Illinois held otherwise.

Counsel cite the case of C. R. I. & P. R. R. v. Arkansas, 219 U. S. 453, where this Court sustained the constitutionality of the Arkansas Full Crew Law. Commissioner Olson (Tr. 2—19) in his dissenting opinion conclusively answered the argument of appellees relative to the effect of

that case. The law was held constitutional because it operated solely within the boundaries of Arkansas and could be enforced in that state without necessarily being enforced in another state. This Court did not hold that, where as a practical proposition an order or statute, in order to be enforced in Illinois required it also to be followed in another State, then the statute or order would be constitutional. The other cases cited in our statement as to jurisdiction clearly answer this argument of appellees and sustain our contention and the position of Commissioner Olson that inasmuch as this order as to the bridge runs cannot be enforced in Illinois without necessarily applying to operations in Missouri, it cannot be sustained. It is obvious in the Arkansas case that when the state line was reached the extra member of the crew could cease work, and that no full crew legislation could require the extra member of the crew to be used in another state where no applicable legislation to that effect existed.

Atlantic Coast Line R. Co. v. Ga., 234 U. S. 290, is also cited, and copiously quoted from. The statute involved in that case required engines in Georgia to be equipped with electric headlights. The headlights could be operated in the state. It was a statute that could be enforced solely in Georgia without necessarily being applicable in other states, and consequently this Court held it constitutional. Both this case and the Arkansas Full Crew case (decided in 1911 and 1913 prior to extension of the Interstate Commerce Act and other federal legislation) were decided before the decision of this Court in South Covington & Cincinnati Street Ry. Co. v. Covington, 235 U. S. 537, which latter case is on all fours with our case. If the Atlantic Coast Line case conflicts with the decision in the Covington case, supra, the latter case is not only later, but is based upon a state of facts very similar to the facts in the case at bar; in fact, this Court in the Covington case,

supra, quoted the Atlantic Coast Line case, supra, as authority for its holding that the provisions of the Covington ordinance held constitutional only incidentally regulated interstate commerce.

The same answer can be made to the case of Whitney v. Johnson, 37 F. Supp. 65, affirmed by this Court in a per curiam opinion in 314 U. S. 574.

Appellees also cite and quote from the recent case of California v. Thompson, 313 U. S. 109. This case involved the constitutionality of a California statute requiring every transportation agent for motor vehicles over the state highways to procure a license from the State Railroad Commission, pay a license fee and file a bond. These transportation agents negotiated for the sale of transportation over the public highways of the state. All that this Court held in that case was that, in the absence of pertinent regulation by Congress, the statute requiring a transportation agent to procure a license, pay a fee and file a bond does not violate the commerce clause when applied to one who negotiates for transportation interstate of passengers over state highways where the license is not conditioned on any control or restriction of movements of traffic interstate, but is conditioned only on the good character and responsibility of those engaged locally as transportation brokers. The Court sustained the legislation on the ground that (a) it was not a revenue measure, (b) it did not operate to increase the cost of transportation and (c) its purpose was only to prevent fraud on the public.

There is nothing in the case of Duckworth v. Arkansas, 314 U. S. 390, to militate against our contention here. It, in fact, sustains the power of the state in the regulation of the liquor traffic under the Twenty-first Amendment. We call particular attention to the concurring opinion of Mr. Justice Jackson as pertinent to the facts in this case.

Counsel discuss the Covington case, supra, 235 U. S. 537, and seek to show from it that that case supports their contention instead of ours. In that case the City of Covington, Kentucky, passed an ordinance which provided, among other things, that passengers could not ride on the rear platform of street cars, except under certain conditions, nor upon the front platform of street cars unless certain conditions were complied with, and requiring the street car company to keep the cars clean, ventilated and fumigated. The ordinance also had provisions relative to the number of passengers to be carried on a car and the number of cars to be provided, and certain requirements as to the heating of the street cars. The railway company operated a street car line from Covington, Kentucky, across the Ohio River to Cincinnati, Ohio. This Court sustained the provisions relative to passengers riding on the rear and front platforms unless suitable barriers or rails were provided and the requirement to keep the cars clean, ventilated and fumigated, because those provisions of the ordinance could be complied with in Covington without necessarily being complied with in Cincinnati. This Court, however, held invalid that part of the ordinance relative to the number of passengers to be carried on a car and the number of cars to be provided, because such provisions of the ordinance were a burden upon interstate commerce for the reason that, inasmuch as the cars went across the river to Cincinnati, the City of Covington was endeavoring to make regulations which, if enforced in Covington, as a practical proposition, would necessarily have to be carried out in Cincinnati, a place where the City of Covington had no jurisdiction. This Court did not base its decision upon the question of whether or not federal laws had superseded state laws, but upon the fact that Covington, Kentucky, could not pass an ordinance as to the number of cars to be run across the bridge on the line of the street railway com-

pany, or as to the number of passengers to be carried on each car, where such regulation would, as a practical proposition, require the same number and kind of cars to be run or the same maximum number of passengers to be carried on each car, in another state, where the City of Covington had no jurisdiction. On page 545 of the opinion the Court said:

> "This court has repeatedly held that whether given commerce is of an interstate character or not is to be determined by what is actually done, and if the transportation is really and in fact between states, the mere arrangements of billing or plurality of carriers do not enter into the conclusion. Here is an uninterrupted transportation of passengers between states, on the same cars, and under practically the same management, and for a single fare. We have no doubt that this course of business constitutes interstate commerce. Texas & New Orleans R. R. v. Sabine Tram Co., 227 U. S. 111; St. Louis, S. F. & T. R. R. v. Seale, 229 U. S. 156; Railroad Commission of Ohio v. Worthington, 225 U. S. 101; Omaha & Council Bluffs Street Ry. v Interstate Commerce Commission, 230 U. S. 324, 336. A contrary conclusion was reached in this case by the Kentucky Court of Appeals upon the authority of Missouri Pacific R. R. v. Kansas, 216 U. S. 262, but that case concerns an order under authority of the State of Kansas, requiring the running of a passenger train wholly within the state. It was pointed out in the course of the opinion that the order did not deal with an interstate train or put a burden upon such train, but simply required the operation within the state of a local train, the duty of operating such train arising from the charter obligation of the company."

After holding as above stated, this Court then divided the ordinance into two parts, as above mentioned, and held valid that part that could be enforced wholly in Covington, without necessarily being enforced in Cincinnati,

but held invalid that part as to the number and kind of cars and the number of passengers to be carried which could not be enforced in Covington without also being enforced in Cincinnati. On pages 547 and 548 of the opinion the Court said:

> "We think the necessary effect of these regulations is not only to determine the manner of carrying passengers in Covington and the number of cars that are to be run in connection with the business there, but necessarily directs the number of cars to be run in Cincinnati, and the manner of loading them when there, where the traffic is much impeded and other lines of street railway and many hindrances have to be taken into consideration in regulating the traffic. If Covington can regulate these matters, certainly Cincinnati can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply."

Furthermore, the Court held that the ordinance requirement as to minimum temperature to be maintained was unreasonable and void for the reason that the evidence showed it to be impossible and impractical in actual operation.

This makes the Covington case an absolute authority in the present case. The undisputed evidence in the present case shows that if cabooses are required on these interstate bridge runs in Illinois, the appellee will necessarily have to have cabooses for great distances in Missouri. In other words, cabooses cannot be furnished to the state line and then taken off, but as a practical proposition, which this Court said was the test in such matters, the full effect of finding 35 is to require cabooses to be put on in the yards in Missouri and carried a considerable distance in Missouri in order to be on the trains when entering Illinois at the state line; and it further re-

quires cabooses to be carried in Missouri after the state line is passed for a considerable distance to the yard in Missouri before they can be detached from the train. These facts are undisputed and are shown conclusively not only by appellee's witnesses, but also by the testimony of Mr. Thomas, the chief inspector of the Commission, who was called as a Commission witness.

We respectfully submit that the Covington case absolutely disposes of this case and it was on the authority of this case and other cases that Commissioner Olson dissented from the order and decision of the Commission.

In its opinion (Tr. 10) the Supreme Court of Illinois seemed to think that this Court held certain portions of the ordinance invalid because of certain franchise provisions of the Street Railway Company in Cincinnati. All that this Court held was (l. c. 547) that this was one of the facts to be considered, as appears from the following short quotation from the opinion:

> "To comply with these regulations, the testimony shows, would require about one-half more than the present number of cars operated by the Company, and more cars than can be operated in Cincinnati within the present franchise rights and privileges, held by the Company, or controlled by it, in that City. Whether, in view of this situation, this regulation would be so unreasonable as to be void, we need not now inquire. These facts, together with the other details of operation of the cars of this Company, are to be taken into view in determining the nature of the regulation here attempted, and whether it so directly burdens interstate commerce as to be beyond the power of the State."

Counsel seek, however, to assert that the Covington case supports their theory, because they say this Court sustained the ordinance provision for barriers or rails on the

rear platform of the car. They misquote the ordinance, as shown by their own quotation from the opinion of this Court. The ordinance provided that no passenger could ride on the rear platform unless it was provided with a suitable rail or barrier. This Court sustained this provision of the ordinance. It did not require a rail or barrier, but only prohibited passengers on the rear platform unless rails or barriers were provided. This could be enforced in Covington and need not be enforced in Cincinnati. When there was no rail or barrier passengers could not ride on the rear platform in Covington, but they could do so when the state line was reached.

We respectfully, in view of the difference of opinion as to the proper construction of the Covington case, refer the Court to the opinion in that case, as a reading of it will bear out our contention in every way.

But counsel for appellees say that the requirement of furnishing a caboose for the protection of switchmen has no more direct effect upon interstate commerce than the requirement of the Arkansas Full Crew Law and the requirement of the Georgia Electric Headlight Law. It is obvious that this argument cannot be sustained. Neither the Arkansas nor the Georgia statute required any compliance in any other state. Each of these laws could be enforced in the respective states enacting them without necessarily being enforced as a practical proposition in any other state. The extra member of the crew could be relieved of work the moment the state line was reached as he was leaving the state and could be put to work only when the state line was reached in entering the state. The electric headlight could be used in Georgia and turned on or off, as the case might be, exactly on the state line without delaying or impeding through traffic. The practical operation of neither of these statutes required compliance in any other state. We respectfully call the Court's atten-

tion to the cases we have cited in our statement as to jurisdiction upon these points.

The same answer can be and is made to the New York electric headlight statute, held constitutional by this Court in N. Y. N. H. & H. R. Co. v. New York, 165 U. S. 628.

Counsel also cite the case of Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262. In that case the order of the State Commission directed the operation of a passenger train between Madison, Kansas, and the state line. This decision was not only before the decision of this Court in the Covington case, supra, but it merely sustained the right of Kansas to require the operation of an intrastate train within the State, where the duty to operate arose from a charter obligation, and, furthermore, the matter of operation beyond the state line was held to be merely a matter of election on the part of the railroad company and not to be required as a matter of practical operation of the railroad. The order dealt with a **local**, not interstate, train designed to make connections with other railroads within the state.

In distinguishing this case from the Covington this Court so held (p. 545).

We submit that on this question we have clearly shown that a substantial Federal question is raised by this appeal. In our brief on the merits we expect to cover the matter fully, but we do not deem it even proper upon this preliminary motion, where the only question raised is that the question is not substantial, to go to great length in arguing this matter. We might even rest our case on this question upon the opinion of the Supreme Court of Illinois, because that opinion shows that not only was a substantial Federal constitutional question raised in this respect, but also that the Supreme Court of Illinois passed upon it. The State Court considered the question substan-

tial, and it is a question of such substantial and important character and nature (and is now of particular importance because of the critical transportation situation induced by the war) that it ought to be determined by this Court when the question is properly raised here on direct appeal.

Congress Has Taken Possession of the Field, and Therefore the Order Is Invalid, Whether the Effect Upon Interstate Commerce Is Direct or Indirect.

Counsel further contend that no substantial Federal question is raised with respect to Congress having taken charge of the field. We have shown by our statement as to jurisdiction, and by the authorities therein cited, that where Congress has taken charge of the field, a State cannot legislate in that field even though the effect upon interstate commerce is indirect, and even though Congress has not legislated as to the particular matters involved. The whole question is whether Congress has taken possession of the field, and it is immaterial then whether it has legislated concerning the particular matter within the field.

In our statement we have pointed out that the furnishing of cabooses was a working condition that has always been determined by contract between appellant and its employes, and that under the amended Railway Labor Act of June 21, 1934, U. S. C. A., Vol. 45, Sup., beginning on page 235, it appears that Congress by that Act conferred upon the National Railroad Adjustment Board full jurisdiction for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions. We further showed that Congress has also taken jurisdiction of the field by the passage of the Car Service provision (paragraphs 10 to 17, incl., and paragraph 21 of Sec. 1 of the Interstate Commerce Act), 49 U. S. C. A., par. 1 (10-17, 21); by the Boiler Inspection Act, 45 U. S. C. A.,

Sec. 22 et seq.; the Power Brake provision of the Safety Appliance Act, 45 U. S. C. A., Sec. 1 et seq.; by Sec. 26 of the Interstate Commerce Act, 49 U. S. C. A. 26, and by Sec. 439 of the Transportation Act of 1920, as construed by the Supreme Court of the United States in Dayton-Goose Creek Ry. Co. v. U. S., 263 U. S. 456, 478. Sec. 439 of the Transportation Act was inserted in the Interstate Commerce Act as Sec. 20a (49 U. S. C. A., Sec. 20a), and subjects to the approval of the Interstate Commerce Commission all issues of securities or other evidences of indebtedness. The effect of this enactment was discussed by this Court in R. R. Com. v. Southern Pacific Ry. Co., 264 U. S. 331.

Appellees contend that this Court, by its decision in Mo. Pac. R. Co. v. Norwood, 283 U. S. 249, has foreclosed us from successfully maintaining the position that Congress has occupied the field by the passage of the National Railway Labor Act. This case was another case involving the Arkansas Full Crew Law. All that this Court held in that case was that the fact that the Railway Labor Act authorized regulation in respect to the practice of the carrier in supplying trains to be provided by the carrier did not include the regulation of the number of brakemen or helpers. The decision construed only that language and does not in any way assert that Congress has not given full jurisdiction to the National Railway Labor Board to settle disputes as to working conditions. In fact, it supports our contention, because it holds that Congress has taken jurisdiction in regard to supplying trains. All that it does hold is that, by taking jurisdiction of that matter and placing it in the Labor Board, Congress did not include the number of brakemen or helpers to be furnished.

Counsel also cite the case of Missouri Pacific R. R. Co. v. Norwood, 283 U. S. 249, as an authority for their contention that by the provisions of the Interstate Commerce

Act, above set forth, Congress has not taken charge of the field, and quote from pages 256 to 258 of the opinion in support of their contention. The language used in the quotation not only does not support appellees' position, but it supports our position. The opinion clearly shows that this Court did hold that by these provisions of the Interstate Commerce Act Congress had taken possession of the field relative to "supply of trains." All that this Court held was that the fact that Congress had taken charge of the field of the "supply of trains" did not take possession of the field concerning how many men should be employed on a train. In other words, the opinion shows that Congress had taken charge of the field so far as supply of trains is concerned. The number of men that operate these trains is immaterial to the supply of trains, and this opinion supports our position that Congress, by reason of the provisions of the Interstate Commerce Act, has taken charge of the field as to the supply and equipment of trains and whether or not a caboose should be attached to runs of this character.

The definitions of "common carriers," "railroad" and "transportation," as contained in paragraph 3 of Section 1 of the Interstate Commerce Act, U. S. C. A., Sup., Title 49, p. 6, clearly sustain our contention. A "railroad" by that section is defined, among other things, as including all switches, spurs, tracks, terminals and terminal facilities of every kind used or necessary in the transportation of the persons or property designated, including all freight depots, yards and grounds used or necessary in the transportation or delivery of any such property. The term "transportation" is defined as including locomotives, cars and other vehicles, vessels and all instrumentalities and facilities of shipment or carriage.

Paragraph 10 of Section 1 of the Interstate Commerce Act, U. S. C. A., Title 49, p. 101, defines "car service" as

including the use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier or railroad subject to the chapter.

Paragraph 11 of Section 1 of the Interstate Commerce Act, U. S. C. A., Title 49, p. 102, makes it the duty of every carrier by railroad subject to the chapter to furnish safe and adequate car service, and to establish, observe and enforce just and reasonable rules, regulations and practices with respect to car service.

Paragraph 12 of Section 1 of the Interstate Commerce Act, U. S. C. A., Title 49, p. 109, takes jurisdiction of the distribution of coal cars.

Paragraph 13 of Section 1 of the Interstate Commerce Act, U. S. C. A., Title 49, p. 115, authorizes the Commission, by general or special orders, to require all carriers by railroad to file from time to time their rules and regulations with respect to car service.

Paragraph 14 of Sec. 1 of the Interstate Commerce Act, U. S. C. A., Title 49, p. 115, authorizes the Commission, after hearing, on complaint, or on its own motion, to establish reasonable rules, regulations and practices with respect to car service by carriers by railroads subject to the chapter, including compensation to be paid for the use of any locomotive, car or other vehicle not owned by the carrier using it, and authorizes the establishment of penalties for nonobservance of such rules, regulations and practices.

Paragreph 15 of Sec. 1 of the Interstate Commerce Act, U. S. C. A., Title 49, p. 116, gives the Commission certain extraordinary powers in case of emergency.

Paragraph 16 of Sec. 1 of the Act permits the Commission to authorize the rerouting of traffic on failure of the initial carrier to serve the public.

Paragraph 17 of Sec. 1 of the Act authorizes the Commission to give directions as to car service and as to all matters referred to in paragraphs 15 and 16 of the act.

Paragraph 21 of Sec. 1 of the Interstate Commerce Act, U. S. C. A., Title 49, p. 132, gives power to the Commission to order a carrier to provide itself with safe and adequate facilities for performing as a carrier its car service as that term is used in the act.

As held in the case of Penn. R. Co. v. Public Service Com., 250 U. S. 566, under the Safety Appliance Act, supra, and the Power Brake Provision Act, supra, Congress has given the Interstate Commerce Commission full jurisdiction over the construction of cabooses and cars. Furthermore, the Transportation Act of 1920, as construed by this Court in Dayton-Goose Creek Ry. Co. v. U. S., 263 U. S. 456-478, covers the situation. Therefore, all that this Court held in the Norwood case, supra, was that these provisions of the Interstate Commerce Act did not empower the Commission to fix the number of men to be employed in train or switching service, although the decision did support our position that the supply of trains, car service, facilities, etc., were within the jurisdiction of the Interstate Commerce Commission by reason of the provisions of the Interstate Commerce Act.

It is clear that the statutes that we have mentioned, in addition to the Railway Labor Act, clearly show that Congress had taken jurisdiction of the field. It has not passed any legislation other than to give jurisdiction to the Interstate Commerce Commission to make rules, etc., for safe and adequate car service, but having taken possession of the field, as we have shown, it is immaterial whether it has taken possession of the particular part of the field involved in this litigation.

This Court held in Penn. R. R. Co. v. Public Service Com., 250 U. S. 566, that Congress has taken over the field

relative to certain matters connected with cabooses. In that case the complaint alleged that in violation of a state statute, the railroad company ran a specified train, the last car of which was not equipped at its rear end with a platform 30 inches in width, guard rails and steps. The train was moving in interstate commerce. The Court, speaking through Mr. Justice Holmes, held the statute unconstitutional because Congress had taken jurisdiction of the subject; and, in referring to the caboose situation, Mr. Justice Holmes said, l. c. 569:

> "The Safety Appliance Act with its careful requirements for the safety of the men was followed by most elaborate regulations issued by the Interstate Commerce Commission which include three large pages of prescriptions for 'caboose cars without platforms.' Caboose cars are constantly used as end cars and these pages, like the Post Office order as to mail cars, recognize the lawfulness of an end car such as the Pennsylvania statute forbids.
>
> "The question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State, must be answered by a judgment upon the particular case. The subject matter in this instance is peculiarly one that calls for uniform law and in our opinion regulation by the paramount authority has gone so far that the statute of Pennsylvania cannot impose the additional obligation in issue here. The Interstate Commerce Commission is continually on the alert, and if the Pennsylvania law represents a real necessity, no doubt will take or recommend steps to meet the need."

In other words, this Court held that Congress having taken charge of all matters connected with the construction of cabooses and mail cars, the states were powerless to legislate. The logical result of this decision is that Congress has taken full jurisdiction of the matter of

cabooses, including their construction, equipment, where they shall be placed in the train and whether they shall be placed at all on trains. The dissenting opinion of Mr. Justice Clark, l. c. 570, acknowledges this construction of the majority opinion.

It is immaterial whether the Interstate Commerce Commission has issued regulations as to when cabooses should be used, i. e., "adequate and safe car service," for Congress has taken possession of the entire field and placed the administration of it in the Commission. If a state cannot say what safety provisions shall be made, as held in the Pennsylvania case, supra, then it cannot require a particular type of car to be placed on the ends of trains, nor can it require any caboose to be used on any interstate runs.

The late cases of Illinois Natural Gas Co. v. Central Illinois Public Service Co., 86 L. Ed. 322, and Clover Leaf Butter Co. v. Patterson, 86 L. Ed. 486, also sustain our position on this point.

While not authority, except by reason of the persuasive nature of the opinions, we call attention to the opinions of the three-judge courts in A. T. & S. F. Ry. v. LaPrade, 2 Fed. Supp. 855, and Southern Pac. R. R. Co. v. R. R. Com. of Cal. et al. (B. of R. T., Intervenors), reported in 10 Fed. Supp. 918. Concurring opinion of Mr. Justice Jackson in Duckworth v. Arkansas, 314 U. S. 390, 62 S. Ct. 311, cited by appellee.

We have already pointed out by record citation that the evidence is undisputed that the furnishing of cabooses has always been treated as a working condition.

The Los Angeles depot case, viz., R. R. Com. v. Southern Pacific, 264 U. S. 331, does not militate against our position, but, on the contrary, supports our contentions.

Northwestern Bell Telephone Co. v. Nebraska, 297 U. S. 471, merely sustained the right of Nebraska to require telephone companies to use a depreciation rate fixed by

the State Commission for the purpose of determining values as to intrastate rates. This Court merely construed the wording of the particular statute involved and held that it did not restrict control until the Interstate Commerce Commission had acted. Furthermore, the part of the opinion quoted applies solely to the use of such a depreciation factor for the determination of rates for intrastate telephone service, and there was no attempt to require such depreciation rate to be used in determining rates for interstate telephone service.

Kelly v. Washington, 302 U. S. 1, limits the right of the states to deal with local exigencies where such conditions exist in the absence of conflict with federal legislation. Neither does this case militate against our contention that if Congress occupies the field, state legislation is prohibited. All that it does hold is that under certain circumstances Congress may by its acts limit the field upon which the legislation operates.

The same answer may be made to the cases of Eichholz v. Public Service Com. of Mo., 306 U. S. 268, and Welch v. N. H., 306 U. S. 79. We do not feel justified in discussing these cases further within the limited scope of a brief of this character. That more properly comes when the case is argued upon its merits.

The Order Deprives Appellant of Its Property Without Due Process of Law.

Counsel next argue that no substantial federal question is raised as to violation of the Fourteenth Amendment. We covered this matter rather fully in our statement as to jurisdiction, and we do not repeat those authorities here.

Appellees state that there is no substantial federal question raised under our contention that the expense involved and the delay to interstate commerce by reason of the enforcement of this order are so great when compared with

the benefit accruing to the one man who could use a caboose that to enforce this order would deprive appellant of its property without due process of law. Counsel do not dispute our statement of the law as contained in our statement as to jurisdiction; in fact, they agree with it. The facts are before the Court. Whether the delay be eleven minutes or forty minutes per run, whether the cost of establishing cabooses be $44,000.00 or $250,000.00, whether the annual expense under normal conditions, to say nothing of present conditions, would be $62,000.00 or $150,000.00, is immaterial in this case. Counsel discuss the facts in detail. We have stated the facts as we understand them, and under the authorities cited in our statement as to jurisdiction, we respectfully submit that the expense and delay incident to appellant in order to comply with the order is so exorbitant and unreasonable when compared with the benefits accruing therefrom, and said benefits to the one man are so disproportionate to the cost thereof to appellant that to enforce this order would deprive appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. Of course, there are some hazards when trains are operated without cabooses that do not exist when cabooses are furnished, to the same extent as there is more hazard in operating a train than in not operating it. However, this record shows such a slight benefit to one person in proportion to the expense involved and the delay incident to interstate commerce by reason thereof that we submit it raises a substantial question as to whether the order violated the Fourteenth Amendment to the Constitution of the United States.

The cases that we have cited show many instances where the expense was far less than it is in this case and the benefits to employes or the public far more, where this Court has held the statutes and regulations unconstitutional in the face of the Fourteenth Amendment.

In conclusion, it is submitted that the only question involved on this motion is whether the federal questions raised are substantial. A decision upon that question does not decide the merits of our contention. We do submit, however, that we have clearly shown, not only by our statement of jurisdiction but also by the opinion of the Supreme Court of Illinois and by this brief, that the federal questions raised by us are substantial and important, and ought to be fully considered by this Court upon full briefs and argument, and not to be disposed of on a mere motion of this kind and character. The present war, together with the great increase in freight transported mainly for war purposes, emphasizes the importance of the case. While the situation would be bad enough under normal conditions if this order were made effective, it would be intolerable under present war conditions when the avoidance of unnecessary delays in transportation may mean a battle won or many lives saved.

We, therefore, respectfully ask that this Court note probable jurisdiction in the matter and deny the motion to dismiss the appeal and the alternative motion to affirm; for the reasons set forth in our statement as to jurisdiction and in this brief, and in order that the substantial and important questions here raised may be determined by this Court upon their merits, after full presentation and argument.

All of which is respectfully submitted.

BRUCE A. CAMPBELL,
RUDOLPH J. KRAMER,
CARLETON S. HADLEY,
WALTER N. DAVIS,
LOUIS A. McKEOWN,
Counsel for Appellant, Terminal Railroad Association of St. Louis.